

Tentative Order Granting Motion to Reopen Case

Plaintiff Continuum Art Holdings International, Ltd. (“Continuum”) moves this Court to reopen this case (“Motion”) so that Continuum may make a motion to enforce the settlement agreement between the parties. (Docket No. 57.) Defendant Harry J. O’Connor (“O’Connor”) opposes (“Opposition”). (Docket No. 58.) Continuum has replied (“Reply”). (Docket No. 59.) For the following reasons, the Court grants this Motion.

I. BACKGROUND

The underlying case involves the sale of fraudulent art allegedly created by the artist Salvador Dalí. (FAC ¶ 1, 26.) Scott Ifversen (“Ifversen”) discovered and purchased a large collection of Salvador Dalí art created for the Alfred Hitchcock film, “Spellbound.” (“Dalí Works.”) (*Id.* ¶ 26, 29.) In order to purchase the collection, Ifversen received a personal loan from O’Connor. (*Id.* ¶ 36.) In exchange for the loan, O’Connor purportedly took a five percent ownership stake in the Dalí Works and took possession of other pieces as collateral. (*Id.* ¶¶ 37-38; Mot. at 2.) In 2012, Continuum discussed buying the Dalí Works from Ifversen. (FAC ¶ 98.) Ifversen then passed away, but Continuum continued to negotiate with the Scott Ifversen Trust (“Trust”) for the purchase. (*Id.* ¶ 104.) Continuum contracted to purchase eleven pieces of the Dalí Works with an option to purchase the remaining upon authentication of the Dalí Works. (*Id.* ¶¶ 97-102.) After Continuum hired a Dalí expert, Nicholas Descharnes (“Descharnes”), to inspect about 60 pieces in the collection in February 2013, Mr. Descharnes concluded the majority of the sample set were fake or highly suspect. (*Id.* ¶¶ 179-180; Mot. at 2.)

On March 4, 2014, Continuum filed the Complaint against the 2012 Scott Ifversen Revocable Trust, Don Lewis as Trustee for the 2012 Scott Ifversen Family Revocable Trust, Don Lewis in his individual capacity, and O’Connor. (Docket No. 1.) The Complaint was subsequently amended on April 2, 2014, and the First Amended Complaint claimed: (1) breach of contract (sale agreement); (2) breach of implied covenant of good faith and fair dealing (sale agreement); (3) breach of contract (option agreement); (4) breach of implied covenant of good faith and fair dealing; (5) fraud; (6) negligent misrepresentation and concealment; and

(7) conspiracy to commit fraud/aiding and abetting fraud. (FAC ¶¶ 194-240, Docket No. 17.)

On May 22, 2014, the parties participated in a negotiation session before Retired Judge James Gray for approximately eleven hours, where the parties reached a settlement agreement and signed a Short Form Settlement Agreement. (Fernald Decl., ¶ 4.) The Short Form Settlement Agreement was signed by Kevin Burk for Continuum; Don Lewis for the Trust; Don Lewis; Lynn Lewis; O'Connor; Jaquelynn Pope; Jaquelynn Pope for Pope & Warshaw. (Mot., Ex. A. at 15-16.) On May 23, 2014, Continuum filed a Notice of Settlement notifying the Court that the "Parties have executed a short form settlement agreement that resolves all of the claims involved in this action." (Docket No. 40.)

On June 3, 2014, the Court dismissed the instant action "in its entirety without prejudice to the right, upon good cause being shown within 60 days, to reopen the action if settlement is not consummated." (Docket No. 42) (emphasis in original). On July 11, 2014, Continuum filed an ex parte application to set aside the Court's order of dismissal and reopen the action, and in the alternative Continuum asked for an extension on the deadline ("Ex Parte Application"). (Docket No. 44.) Continuum represented that despite its "persistent and diligent efforts to document and conclude the settlement, Defendant Jerry O'Connor ('O'Connor') continually refuses to cooperate and has unreasonably delayed the completion of the long form settlement agreement." (Ex Parte Application at 1-3, Docket No. 44.)

The Court granted Continuum's alternative request for an extension, and the Court subsequently granted two additional requests for extensions. (Docket Nos. 46, 51, 56.) According to the most recent order extending the deadline to reopen the case (Docket No. 56), the Court ordered that "[t]he existing period for reopening the case under the Order of Dismissal will be extended to January 31, 2015." (Order at 2, Docket No. 56.) Continuum made a motion to reopen two days after the deadline on February 2, 2015. (Docket No. 57.)

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 60(b), the court may relieve a party from a final judgment, order, or proceeding for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). If the motion is made under Rule 60(b), the motion "must be made within a reasonable time."

Fed. R. Civ. P. 60(c)(1).

III. DISCUSSION

Plaintiff's Motion was filed pursuant to the Court's November 21, 2014 Order and pursuant to Rule 60. (Mot. at 4.)

A. Motion to Reopen Pursuant to the Court's November 21, 2014 Order

Pursuant to the Court's November 21, 2014 Order (Docket No. 56), the deadline to show cause for reopening the case was on January 31, 2015. (*Id.* at 2.) Continuum filed this Motion on February 2, 2015. (Docket No. 57.)

Continuum contends that this Motion is timely pursuant to the Court's November 21, 2014 Order. (Mot. at 4; Reply at 3-4.) Because the January 31, 2015 deadline fell on a Saturday, Continuum believed it had until the following business day (February 2, 2015) to make the filing. (Reply at 4.) Continuum did not provide any authority to support its argument. To the extent Continuum relied on Rule 6, Fed. R. Civ. P. 6, that rule does not apply here. Rule 6 pertains to computing deadlines when the deadline is stated in the form of a time period. Fed. R. Civ. P. 6(a). According to the November 21, 2014 Order, the Court did not provide the deadline by stating a period of time; rather, the Court explicitly stated that the deadline is on January 31, 2015. (November 21, 2014 Order at 2.) According to Local Rule 5-4.6.1, "[u]nless otherwise provided by order of the assigned judge, all electronic transmissions of documents must be completed prior to midnight Pacific Standard Time or Pacific Daylight Time, whichever is in effect at the time, in order to be considered timely filed on that day." C.D. Cal. R. 5-4.6.1; *see* Fed. R. Civ. P. 6(a)(4)(A). Because Continuum's Motion was electronically filed on February 2, 2015 at 6:49 PM Pacific Standard Time (Docket No. 57), Continuum's motion to reopen pursuant to the Court's Order is not timely. However, Continuum also requested relief pursuant to a Rule 60(b) motion. (Mot. at 1). Thus, the Court will treat this as a Rule 60(b) motion for relief from the Court's order of dismissal.

B. Motion to Reopen Pursuant to Rule 60

O'Connor argues that Continuum's motion for relief under rule 60(b)(6) would not be justified. (Opp. 5-7.) However, this Court disagrees.

1. *Timeliness*

As a threshold matter, the Court finds this Motion timely under Rule 60(c)(1). Because Continuum filed this Motion on February 2, 2015—just two days after the deadline for seeking relief pursuant to the order of the Court—this Court finds that this Motion has been made in a reasonable amount of time.

2. *Extraordinary Circumstances*

Next, O'Connor contends that this is not an extraordinary circumstance that justifies relief under Rule 60(b)(6) because Continuum has failed to establish a complete frustration of the Short Form Settlement Agreement. (Opp at 5-7.) However, the Court disagrees.

Generally, only “extraordinary circumstances” justify relief under the Rule 60. United States v. Sparks, 685 F.2d 1128, 1130 (9th Cir. 1982). Repudiation of a settlement agreement that terminated litigation pending before a court constitutes an extraordinary circumstance, and it justifies vacating the court’s prior dismissal order. Keeling v. Sheet Metal Workers Int’l Ass’n, Local Union 162, 937 F.2d 408, 410 (9th Cir. 1991).

Here, the parties signed an agreement, and the litigation before this Court was terminated as a result of reaching an agreement. (Docket No. 42.) O'Connor’s repudiation of the agreement amounts to a complete frustration of the agreement. The parties – including O'Connor – engaged in an eleven-hour mediation, and the parties – including O'Connor – signed the Short Form Settlement Agreement.¹ (Mot., Ex. A.) Prior to the negotiations, there was no mention of the existence of a pension fund or the fact that O'Connor may lack authority. Rather, according to the Short Form Agreement, O'Connor agreed to transfer the Dalí works in his possession:

“To the extent that the O'Connor Dalí Collateral is not already at

¹ O'Connor characterized the facts differently. “Ultimately, at the mediation, the parties could not agree on a final settlement agreement, and therefore, they signed an ‘agreement to agree’ on some final version of an agreement in the future. The parties called their memorialization the ‘Short Form Settlement Agreement.’” (Opp. at 3.) To the extent that O'Connor will argue the settlement is not enforceable, that motion is not before the Court today.

Artworks San Diego (8835 Balboa Ave., San Diego), O'Connor will within ten days of execution of this Agreement, transfer all "O'Connor Dalí Collateral to Artworks San Diego."

(Mot., Ex. A § III(G)).

O'Connor contends that in 2012, O'Connor's Pension Plan, the Ronnoco Defined Benefit Pension Plan ("Pension"), acquired an interest in the Dalí Work and has been left out of the negotiation. (Opp. at 2.) Since signing the Short Form Settlement Agreement, O'Connor has not consummated the long form settlement agreement and refused to produce the Dalí Works on the basis that the Pension also possesses an interest in the Dalí Works.² (Mot. at 4; Fernald Decl. ¶¶ 6-10.) Thus, O'Connor's production of the Dalí Works is a critical component of executing the Short Form Settlement Agreement, and O'Connor's repudiation amounts to a complete frustration of the agreement.

Furthermore, in support of its position, O'Connor cites to several cases. (Opp. at 5-7.) However, this line of reasoning is unpersuasive. For example, the district court in Hermetic found the moving party failed to demonstrate a "repudiation or 'complete frustration'" of a settlement agreement when parties simply disagreed over the proper interpretation of the terms of the settlement agreement, and the Ninth Circuit found this was not an abuse of discretion. Hermetic Order of the Golden Dawn, Inc. v. Griffin, 400 F. App'x 166, 167 (9th Cir. 2010). However, the dispute here does not involve a matter of interpreting the terms. O'Connor contests the underlying validity of the agreement itself based on the premise that the Pension was improperly excluded from the negotiations. (Opp. at 7.)

O'Connor also cites to Sakuma v. Ass'n of Apartment Owners of the Tropics at Waikale. 311 F. App'x 9, 11 (9th Cir. 2009). In this Ninth Circuit memorandum disposition, the court appears to have decided the Rule 60(b)(6) motion in that case based on the timeliness issue. Id. ("However, the alleged breaches occurred long before Sakuma filed her Rule 60(b)(6) motion. Sakuma

² O'Connor also alleges that the Pension is a critical party that was left out of the negotiations and thus the Short Form Settlement Agreement is not valid. (Opp. at 7.) O'Connor did not provide any support for its allegations pertaining to the Pension. However, to the extent these statements are supported, these facts would still favor granting relief under Rule 60(b)(6) so that the parties can be returned to the status quo prior to signing the agreement.

should have raised her contention earlier, including in a prior Rule 60 motion that has already been affirmed by this court. This contention is therefore untimely.”³ Thus, Sakuma also fails to support O’Connor’s argument.

O’Connor also cites to Joe Hand Promotions, Inc. V. Rangee, 2013 U.S. Dist. LEXIS 180367 (E.D. Cal. Dec. 24, 2013) and Glass v. Beer, 2011 U.S. Dist. LEXIS 45884 (E.D. Cal. Apr. 20, 2011), but the reasoning in these cases is not applicable here. In Joe Hand and Glass, the courts’ finding in those cases hinges on whether a delayed payment is sufficient to justify relief under Rule 60(b)(6). Joe Hand, 2013 U.S. Dist. LEXIS 180367, at *9; Glass, 2011 U.S. Dist. LEXIS 45884, at *4-5. The court in Joe Hand also highlighted that the moving party did not allege a complete frustration. Joe Hand, 2013 U.S. Dist. LEXIS 180367, at *10. In Glass, the court also emphasized that the delay in payment was caused by the state’s budgetary issues, rather than a repudiation or an extraordinary circumstances. Glass, 2011 U.S. Dist. LEXIS 45884, at *4-5. Unlike Joe Hand and Glass, delayed payment is not at issue here. According to Continuum’s allegations, O’Connor is delaying the entire execution of the agreement by not producing the Dalí Art, by not communicating with Continuum, and by contending that the agreement fails to account for the interests of another party. (Reply at 5-6.) Thus, O’Connor’s repudiation is much more severe than delaying a payment.

3. Bad Faith

Furthermore, O’Connor argues that any frustration of the Short Form was not the result of bad faith or extraordinary actions by the parties. (Opp. At 7). To support his argument, O’Connor cites to Williams v. Horel, 2012 U.S. Dist. LEXIS 75821 (N.D. Cal. May 31, 2012) and Streeter v. Cnty of Santa Clara, 2011 U.S. Dist. LEXIS 28335 (N.D. Cal. Mar. 4, 2011). (Opp. At 6-7.) In Williams and Streeter, the moving party failed to provide sufficient evidence that the alleged noncompliance pertained to an obligation recognized in the agreement. Williams, 2012 U.S. Dist. LEXIS 75821, *4-5; Streeter, 2011 U.S. Dist. LEXIS 28335, at *5-6. On those facts, the court concluded there was no bad faith noncompliance. Id.

³ The Ninth Circuit makes a single reference without any contextual facts to a “single breach alleged to have occurred in June 2006” which the court found to be not a “complete frustration.” Id. However, the Ninth Circuit memorandum disposition does not provide enough facts for this analogy to be persuasive. In any case, this repudiation here is not merely a single breach.

However, O'Connor's obligation to produce the Dalí Works was explicit. (Mot, Ex. A § III(G)). O'Connor had an obligation to transfer the Dalí Art. (Id.) But his refusal to do that and lack of responsiveness indicates bad faith noncompliance. Moreover, O'Connor engaged in an eleven-hour long negotiation with the other interested parties and never mentioned that he does not have the authority to negotiate on behalf of the Pension. Furthermore, after repeated attempts by Continuum's counsel to reach out regarding the Pension, O'Connor has been unresponsive. (Fernald Decl. ¶¶ 7-8.) Thus, the Court finds that Continuum produced sufficient evidence of bad faith noncompliance.

Accordingly, Plaintiff has sufficiently met its burden to warrant relief from the Court's order of dismissal pursuant to Rule 60.⁴

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Continuum's Rule 60 motion for relief from the Court's order of dismissal. The Court emphasizes that none of its remarks in this are intended to preclude or predetermine any motion to compel settlement.

IT IS SO ORDERED.

⁴ O'Connor's Opposition raised a number of issues as to whether this Court has jurisdiction to enforce the Short Form Settlement Agreement once the case is reopened. (Opp. at 7-9.) However, this Court need not decide those issues today. O'Connor will have a chance to address its position at a later time if and when the motion to enforce is filed.